Dayapi Holdings Sdn Bhd & Anor v Arab-Malaysian Finance Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D1–22–1291 OF 1990
MOHD HISHAMUDIN J
23 SEPTEMBER 2008

Civil Procedure — Summary application — Rules of the High Court 1980, O 14A — Action involved multiple issues — Action reached final stage of case management and set down for trial — Whether O 14A appropriate course of action

The second plaintiff successfully applied for a loan facility of RM8,000,000 from the first defendant. As one of the securities for the loan facility, the first plaintiff deposited 3,400,000 shares that it held in a company known as Dayapi Industries (M) Bhd to the first defendant by way of a memorandum of deposit. Pursuant to the memorandum of deposit, the first defendant registered the said shares in favour of the second defendant. Subsequently, the first defendant alleged that the second plaintiff had breached the loan facility agreement and in the exercise of its right to enforce the security had sold 3,289,000 of the shares to a third party. The plaintiffs challenged the legality of the sale of the shares on the grounds that the second plaintiff had not committed any breach of the loan facility; and even assuming that there had been a breach of the loan facility, the defendants had sold the shares at a price that was way below the market price, thus causing loss to the plaintiffs. Pursuant to a joint oral application for the action to be heard by way of an O 14A of the Rules of the High Court 1980 ('RHC') procedure, a preliminary interlocutory order ('preliminary order') was made by the then trial judge.

Held, dismissing the application with no order as to costs:

(1) It was not legally feasible or appropriate for the court to make any decision with regard to the multiple issues set out in the preliminary order when the issues set were too numerous and not suitable to be determined merely by way of an O 14A proceedings. Further, the present judge neither had the full facts of the case nor the affidavit evidence for his consideration. There exists only the statement of agreed facts which was insufficient to form a basis upon which rulings to be

made on all the issues raised in the preliminary order. Also, although there were seven common agreed bundles of documents mentioned in the preliminary order it was not clear as to whether, besides the authenticity of the documents were agreed upon, the contents of the documents were agreed as well (see paras 18, 25, 27).

(2) The lack of the plaintiffs' written submission had deprived the court of an important piece of material to work on for the purpose of arriving at a decision that is fair and just, to both parties. Further, as a matter of procedural law the parties could no longer invoke O 14A as the case had reached the final stage of case management and it had been set down for trial. The appropriate course to adopt was to invoke O 33 rr 2, 3(2) and 5 of the RHC (see para 31–32).

[Bahasa Malaysia summary

Plaintif kedua berjaya memohon kemudahan pinjaman sebanyak RM8,000,000 daripada defendan pertama. Sebagai salah satu jaminan untuk kemudahan pinjaman tersebut, plaintif pertama mendepositkan 3,400,000 saham yang dipegangnya di dalam syarikat yang dikenali sebagai Dayapi Industries (M) Bhd kepada defendan pertama melalui memorandum deposit. Berikutan memorandum deposit, defendan pertama mendaftarkan saham-saham tersebut memihak kepada defendan kedua. Kemudian defendan pertama mendakwa bahawa plaintif pertama telah memungkiri perjanjian kemudahan pinjaman tersebut dan di dalam melaksanakan haknya untuk menguatkuasakan jaminan, telah menjual 3,289,000 daripada saham-saham kepada pihak ketiga. Plaintif-plaintif mencabar kesahan penjualan saham-saham tersebut atas alasan bahawa plaintif kedua tidak melakukan sebarang pelanggaran kemudahan pinjaman tersebut; dan walau menganggap bahawa sememangnya terdapat pelanggaran kemudahan pinjaman tersebut, defendan-defendan telah menjual saham-saham pada harga yang kurang daripada harga pasaran, dengan itu menyebabkan kerugian kepada plaintif-plaintif. Berikutan permohonan lisan bersama untuk tindakan tersebut didengar melalui prosedur di bawah A 14A Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), satu perintah awalan interlokutori ('perintah awalan') telah diberikan oleh hakim bicara pada masa itu.

Diputuskan, menolak permohonan tanpa perintah untuk kos:

(1) Ia tidak munasabah dari segi undang-undang untuk mahkamah membuat apa-apa keputusan berkaitan dengan isu-isu yang berganda yang disenaraikan di dalam perintah awalan apabila isu-isu yang disenaraikan adalah terlalu banyak dan tidak sesuai untuk diputuskan

A semata-mata melalui prosiding A 14A. Selanjutnya hakim sekarang tidak mempunyai fakta-fakta penuh kes tersebut dan tidak mempunyai keterangan afidavit untuk pertimbangannya. Hanya terdapat pernyataan fakta-fakta yang dipersetujui yang tidak mencukupi untuk membentuk asas di atas mana keputusan boleh dibuat atas kesemua B isu-isu yang dibangkitkan di dalam perintah awalan. Juga, walaupun terdapat tujuh ikatan dokumen yang dipersetujui bersama yang dinyatakan di dalam perintah awalan tersebut ia tidak jelas sama ada, selain daripada ketulenan dokumen-dokumen yang dipersetujui, kandungan dokumen-dokumen juga dipersetujui (lihat perenggan 18, C 25, 27).

(2) Ketiadaan hujahan bertulis plaintif-plaintif menyebabkan mahkamah kehilangan suatu sumber yang amat penting untuk didasarkan bagi tujuan membuat keputusan yang adil dan saksama untuk kedua-dua pihak. Selanjutnya, sebagai undang-undang prosedur pihak-pihak tidak D boleh lagi menggunakan A 14A kerana kes tersebut telah mencapai peringkat akhir pengurusan kes dan ia telah ditetapkan untuk perbicaraan. Tindakan yang sewajarnya diambil ialah di bawah A 33 kk 2, 3(2) dan 5 KMT (lihat perenggan 31–32).]

E **Notes**

For a case on O 14A of the Rules of the High Court 1980, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) para 6823.

F **Cases referred to**

Jaafar Shaari & Anor (suing as administrator of the estate of Shofiah bt Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693; [1997] 4 CLJ 509, FC (refd)

G **Legislation referred to**

Rules of the High Court 1980 O 14A, O 33 rr 2, 3, 5, O 34 r 2

Mokhtar Ngah (Mokhtar Ngah & Co) for the plaintiffs.
KK Chan (Shook Lin & Bok) for the defendants.

H **Mohd Hishamudin J:**

[1] In the present case, the undisputed facts are these. The second plaintiff, namely, Ampang Granite Sdn Bhd ('Ampang Granite'), applied for a loan I facility of RM8,000,000 from the first defendant, namely, Arab-Malaysian Finance Bhd ('Arab-Malaysian Finance'). The loan was granted. Arab-Malaysian Finance issued Ampang Granite with two letters of offer dated 6 August 1985 and 7 December 1985. Following Ampang Granite's acceptance of the letters of offer, Ampang Granite and Arab-Malaysian

Finance then entered into a loan agreement on 27 December 1985. As one of the securities for the loan facility, the first plaintiff, namely, Dayapi Holdings (M) Sdn Bhd ('Dayapi Holdings') deposited 3,400,000 shares that it held in a company known as Dayapi Industries (M) Bhd (now known as Golden Plus Holdings Bhd) ('the Dayapi shares') to Arab-Malaysian Finance. The pledge is by way of a memorandum of deposit dated 27 December 1985 executed by Dayapi Holdings in favour of Arab-Malaysian Finance. Pursuant to the memorandum of deposit, Arab-Malaysian Finance caused the Dayapi shares to be registered in favour of the second defendant, namely, Arab-Malaysian Nominees Sdn Bhd.

[2] Subsequently, Arab-Malaysian Finance alleged that Ampang Granite had breached the loan facility agreement (this allegation is disputed by Ampang Granite), and claimed that by reason of the said breach it had the right to enforce the security.

[3] On 6 July 1989 Arab-Malaysian Finance, allegedly in the exercise of its right to enforce the security pursuant to the loan agreement and memorandum of deposit, sold 3,289,000 of the said Dayapi shares to a third party known as Novus Holdings Bhd ('Novus Holdings') at a price of RM0.95 per share ('the Novus sale'). The proceeds of the Novus sale were credited into the account of Ampang Granite with Arab-Malaysian Finance on 12 January 1990.

[4] On 6 July 1989, the Dayapi shares were traded on the Kuala Lumpur Stock Exchange at RM0.865 per share.

[5] By a letter dated 16 January 1990, Arab-Malaysian Finance informed Ampang Granite of the Novus sale.

[6] On 16 January 1990, the Dayapi shares were traded on the Kuala Lumpur Stock Exchange at RM3.90 per share.

[7] In the present case, the plaintiffs challenge the legality of the sale of the Dayapi shares to Novus Holdings on the grounds that the Ampang Granite had not committed any breach of the loan facility; and even assuming that there had been a breach of the loan facility, the defendants had sold the Dayapi shares at a price that was way below the market price, thus causing loss to the plaintiffs.

[8] Enclosure 90, which we are concerned at the moment, is a preliminary interlocutory order ('the preliminary order') made by my predecessor,

Vincent Ng J (as he then was), on 28 September 2006 pursuant to a joint oral application by the plaintiffs and the defendants for the action to be heard by way of an O 14A procedure.

[9] Order 14A of the Rules of the High Court 1980 ('the RHC') provides:

> Order 14A Disposal of Case on Point of Law.
>
> Rule 1 Determination of questions of law or construction (O 14A r 1)
>
> (1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that —
>
> (a) Such question is suitable for determination without the full trial of the action; and
>
> (b) Such determination will finally determine the entire cause or matter or any claim or issue therein.
>
> (2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

[10] It is important to note in the present case that there was no *formal written* application made by any party for the cause to be heard by way of an O 14A proceeding. There was just an oral application. The joint oral application was first made by the parties on 7 March 2006, that is, the day when the trial of the case was supposed to commence. Because of the application, the trial did not proceed. Instead, on the application of the parties, the case was adjourned to the following day, 8 March 2006. However, on 8 March 2006 parties were yet to agree on the terms of the consent preliminary order, and the case was adjourned to 9 March 2006. On this date, parties recorded before the judge a consent preliminary order. And the case was fixed for the hearing of the O 14A application to be held on 18–21 September 2006. However, on 18 September 2006, again the court was unable to proceed with the hearing. For, both parties informed Vincent Ng J that they now wished to review the statement of agreed main issues as set out in the order of 9 March 2006. After two postponements, eventually the *final* consent preliminary order was recorded before Vincent Ng J on 28 September 2006. The hearing of the O 14A application was then adjourned to 12 March 2007; then for some reason the hearing was adjourned to 25 June 2007, but on 25 June the hearing could not be proceeded with as Vincent Ng J was on leave and the matter was adjourned to 6 August 2007. However, in July 2007 Vinceng Ng J was elevated to the Court of Appeal.

[11] I was transferred to this court on 1 January 2008, and the matter came up before me for the first time, for mention only, on 20 February 2008. Eventually, the hearing of the O 14A application was fixed to be held on 30 June 2008.

[12] However, going back to the date 7 March 2006, I wish to state here that this is not the first time that the case had been called up for trial. The case had been called up for trial a few times before, not only before Vincent Ng J, but also before his predecessor, namely, T Selventhiranathan J. But I shall allude to the history of this case later in this judgment.

[13] Now, as I have pointed out earlier, there has been no formal written application by any party to invoke the O 14A procedure. There was only an oral application made jointly by the parties. Hence, there is no affidavit evidence in support of the application. This being the case, I am somewhat handicapped in dealing with this O 14A application at this second stage (to determine the issues posed by the preliminary order on their merits) of the proceeding. Without sufficient undisputed credible evidence, be it by way of oral evidence (which is clearly out of question here) or by way of affidavit evidence, I am unable to make any ruling on issues of law or on the construction of documents posed. This difficulty is further compounded by the fact that the plaintiffs (the co-applicants) were absent at the date (30 June 2008) of the hearing of the O 14A application before me.

[14] It is, however, true that there is the statement of agreed facts. But I find that the agreed facts are insufficient for the purpose of my decisions on the multiple issues posed.

[15] The preliminary order sets out the issues to be determined by the court. And they are many. The preliminary order reads as follows:

> BEFORE HIS LORDSHIP JUSTICE DATO' VINCENT NG KIM KHOAY
>
> THIS 28TH DAY OF SEPTEMBER 2006
>
> OPEN COURT
>
> CONSENT ORDER
>
> UPON THE APPLICATION of the plaintiffs and the defendants in this action AND UPON HEARING Dato' Mokhtar Ngah, solicitors for the plaintiffs, and Mr Chan Kok Keong (with Ms Audrey Tang), solicitors for the Defendants,
>
> IT IS BY CONSENT ORDERED THAT the claim by the plaintiffs against the defendants in this action will be determined without the full trial of the action and such determination will finally determine the plaintiffs' entire claim pursuant to Order 14A rule 1(1) of the Rules of the High Court 1980 based on the determination of questions of law and/or construction of documents arising from

A the agreed issues set out in the Consent Order dated 9.3.2006 and which issues parties have agreed to redefine and amend in the manner set out below:

1. Whether the 1st defendant has the right to sell the 3,289,000 of the shares in Dayapi Industries (M) Berhad ('the Shares') and whether the sale was illegal.

B 1.1 Whether the loan was repayable in fixed repayment due dates as set out in the Letters of Offer dated 6.8.1985 and 7.12.1985 including Clause 10 thereof, in the Loan Agreement dated 23.1.1986 including in Section 2.01 thereof and/or under the provisions of the Charge dated 2.7.1986 including the Annexure thereto.

1.2 Whether the loan was repayable on demand within the meaning of the Letters
C of Offer dated 6.8.1985 and 7.12.1985 and/or the Loan Agreement dated 23.1.1986 and/or Memorandum of Deposit dated 27.12.1985 and/or the Annexure to the Charge dated 2.7.1986.

1.3(a) Whether a breach in the repayments and/or a failure to maintain the required security value of the Shares constituted an event of default pursuant to the
D terms of the Letters of Offer dated 6.8.1985 and 7.12.1985 and/or the Loan Agreement dated 23.1.1986 and/or the Memorandum of Deposit dated 27.12.1985 and/or the Charge dated 2.7.1986 and/or Common Agreed Bundle Of Documents ('CABD') in particular:

(i) the letters dated 20.3.1986, 11.4.1986, 21.4.1986, 29.5.1986,
E 5.8.1986, 9.9.1986, 16.2.1987, 19.3.1987, 18.6.1987, 25.8.1987, 16.10.1987, 24.11.1987 and 24.7.1989 (CABD 384, 397, 412–413, 419, 422–423, 437-438, 488, 624–625, 627, 628–629, 632, 633–634, 636–639, 642–644);

F (ii) the letter dated 14.7.1989 (CABD 487A–B);

(iii) the letter dated 23.11.1989 (CABD 494);

(iv) AMFB letter dated 16.1.1990 (CABD 495–6);

(v) letter dated 25.1.1990 (CABD 501);

G (vi) letter dated 20.2.1990 (CABD 503);

(vii) letter dated 24.7.1989 to Dato' Yap Peng (CABD 488);

(viii) letter dated 24.7.1989 to Ampang Granite (CABD 489)

H and whether the 1st defendant was entitled to proceed to enforce the securities thereafter.

1.3(b) Whether the failure to comply with the demand that was issued was an event of default pursuant to terms of the Letters of Offer dated 6.8.1985 and 7.12.1985 and/or the Loan Agreement dated 23.1986 and/or the
I Memorandum of Deposit dated 27.12.1985 and/or the Charge dated 2.7.1986 and/or respective documents in Common Agreed Bundle Of Documents ('CABD') in particular:

(i) the letters dated 20.3.1986, 11.4.1986, 21.4.1986, 29.5.1986, 5.8.1986, 9.9.1986, 16.2.1987, 19.3.1987, 18.6.1987, 25.8.1987, 16.10.1987, 24.11.1987 and 24.7.1989 (CABD 384, 397, 412–413, 419, 422–423, 437–438, 488, 624–625, 627, 628–629, 632, 633–634, 636-639, 642–644);

(ii) the letter dated 14.7.1989 (CABD 487A–B);

(iii) the letter dated 14.7.1989 (CABD 487A–B);

(iv) the letter dated 23.11.1989 (CABD 494);

(v) AMFB letter dated 16.1.1990 (CABD 495–6);

(vi) Letter dated 25.1.1990 (CABD 501);

(vii) Letter dated 20.2.1990 (CABD 503);

(viii) Letter dated 24.7.1989 to Dato' Yap Peng (CABD 488);

(ix) Letter dated 24.7.1989 to Ampang Granite (CABD 489);

and whether the 1st Defendant was entitled to thereafter proceed to enforce the securities.

1.3(c) Whether an event of default within the meaning of the Letters of Offer dated 6.8.1985 and 7.12.1985, the Loan Agreement dated 23.1.1986, Memorandum of Deposit dated 27.12.1985 and/or the Charge dated 2.7.1986 has occurred and if so, whether such an event was sufficient to entitle the 1st Defendant to enforce the securities without the need to issue a demand and/or a notice recalling the entire sum due under the loan.

1.4(a) Whether the giving of a notice of demand was required under the terms of the Letters of Offer dated 6.8.1985 and 7.12.1985 and/or the Loan Agreement dated 23.1986 and/or the Memorandum of Deposit dated 27.12.1985 and/or the Charge dated 2.7.1986 for an event of default and/or whether the giving of a notice of demand was one of the events of default within the meaning of the Letters of Offer dated 6.8.1985 and 7.12.1985 and/or the Loan Agreement dated 23.1.1986 and/or Memorandum of Deposit dated 27.12.1985 and/or the Charge dated 2.7.1986 and/or respective documents in Common Agreed Bundle Of Documents ('CABD') in particular:

(i) the letters dated 20.3.1986, 11.4.1986, 21.4.1986, 29.5.1986, 5.8.1986, 9.9.1986, 16.2.1987, 19.3.1987, 18.6.1987, 25.8.1987, 16.10.1987, 24.11. 1987 and 24.7.1989 (CABD 384, 397, 412–413, 419, 422–423, 437–438, 488, 624–625, 627, 628–629, 632, 633–634, 636–639, 642–644);

(ii) the letter dated 14.7.1989 (CABD 487A–B);

(iii) the letter dated 14.7.1989 (CABD 487A–B);

(iv) the letter dated 23.11.1989 (CABD 494);

A (v) AMFB letter dated 16.1.1990 (CABD 495-6);

(vi) Letter dated 25.1.1990 (CABD 501);

(vii) Letter dated 20.2.1990 (CABD 503);

B (viii) Letter dated 24.7.1989 to Dato' Yap Peng (CABD 488);

(ix) Letter dated 24.7.1989 to Ampang Granite (CABD 489).

1.4(b) Whether the giving of a notice of recall was a pre-requisite for an event of default within the meaning of the Letters of Offer dated 6.8.1985 and 7.12.1985 and/or the Loan Agreement dated 23.1.1986 and/or Memorandum C of Deposit dated 27.12.1985 and/or the Charge dated 2.7.1986.

1.5 Whether the letter of demand dated 16.10.1987 is a valid demand at law.

1.6 Whether the letter of recall dated 24.11.1987 is a valid recall at law.

1.7 Whether if there was a valid demand and/or recall, upon the letters dated D 16.10.1987 and/or 24.11.1987, what is the legal effect or consequence of the same?

1.8 Whether the 1st defendant's right to sell the Shares had arisen within the meaning of the Letters of Offer dated 6.8.1985 and 7.12.1985 and/or the Loan Agreement dated 23.1.1986 and/or the Memorandum of Deposit dated E 27.12.1985 and/or the Annexure to the Charge dated 2.7.1986 and if such a right to sell had arose, whether the sale of the Shares as effected by the 1st Defendant was valid at law.

1.9 Whether the letter dated 24.7.1989 was a valid demand and/or recall at law and if so what is the legal effect of the letter dated 24.7.1989 to the sale of the F Shares as effected by the 1st defendant and/or what is the legal effect of the letter dated 24.7.1989 to the earlier letter of demand of 16.10.1987 and/or the letter of recall of 24.11.1989.

1.10(a) Whether the 1st Plaintiff is entitled to claim an equitable right of redemption of the Shares.

G 1.10(b) Whether the giving of prior and/or sufficient notice to the 1st Plaintiff was a legal pre-requisite under the terms of the Memorandum of Deposit dated 27.12.1985 and/or under the Common Law (if any) before entering into the sale of the Shares transaction with Novus Holdings Bhd ('Novus') and whether the sale of Shares transaction with Novus was always subject to the equitable right of redemption of the 1st Plaintiff under the terms of the Memorandum H of Deposit dated 27.12.1985 and/or under the common law (if any).

1.11 Whether the 1st Plaintiff's right of redemption under the terms of the Memorandum of Deposit dated 27.12.1985 and/or under the Common law (if any) was curtailed or impeded by reason of the notification of the sale of shares transaction with Novus being given by the 1st Defendant only by its letter of I 12.1.1990.

1.12 Whether, if any equitable right of redemption of the Shares of the 1st Plaintiff arose, it was incumbent upon the 1st Defendant under the terms of the Memorandum of Deposit dated 27.12.1985 and/or under the Common Law (if any) to give notice to the 1st Plaintiff of the sale of the Shares.

1.13 Upon the proper determination made relating to questions Nos. 1.10(a), 1.10(b), 1.11 and question No. 1.12 above, what is the legal effect of the sale transaction with Novus?

2. Whether the value of the shares should be adjudged at the date of entry of the contract for the sale of the said shares (i.e. on 14.7.1989) (at RM0.95 per share) at or alternatively at the date of the total sale proceeds were received on 12.1.1990 (at RM3.90 per share) or at the date of notification on 16.1.1990 (at RM3.90 per share) or as at any other date where the said shares had fetched highest value (at RM3.90 per share).

2.1 Whether the value of sale of the Shares to Novus was at a proper and/or valid value and whether the value of the Shares should be adjudged at the date of entering into the sale with Novus on 14.7.1989 or alternatively on the date of completion of the sale on receipt of full sale proceeds on 12.1.1990 or the date of notification of the said sale to the 2nd Plaintiff on 16.1.1990 or at any other date the Shares would have fetched the highest value of RM3.90 per share.

2.2 If the sale of the Shares to Novus was invalid, illegal and/or improper, whether the sale of the Shares caused the 1st and/or the 2nd Plaintiff any loss of opportunity to acquire further shares under the Rights Issue exercise relating to the Shares (of one Share to one right issue Share) and if so, whether the 1st and/or the 2nd Plaintiff is entitled to claim such loss of opportunity to acquire the Rights Issue and to assess such loss (if any);

AND IT IS FURTHER BY CONSENT ORDERED THAT the said agreed issues shall be determined without the calling of oral evidence and upon submissions on the documents filed in this action and identified as Common Agreed Bundles of Documents Jilid 1, Jilid II, Jilid III, Jilid IV, Jilid 4B, Jilid V and Jilid VI and on the Statement of Agreed Facts duly signed by the parties on 25.6.1998 and filed in this action as Enclosures 2A.

Dated this 28th day of September 2006.

Senior Assistant Registrar

High Court, Kuala Lumpur

[16] Apart from the terms of the preliminary order themselves, the materials before the court are the statement of agreed facts, the seven volumes of the common agreed bundles of documents (as mentioned in the above preliminary order) and the written submission of counsel for the defendants. (There is no written submission of counsel for the plaintiffs as he (Encik Mokhtar Ngah) was absent on the hearing date (30 June 2008) of the O 14A procedure before me.)

[17] As I have said earlier, the preliminary order of 28 September 2006 is merely a preliminary order. On my part, on hearing the application at its second stage of the proceeding, I have to make the final order, that is to say,

to make a decision as to whether, upon deciding on the multiple issues of law posed and on the construction of documents, I should decide the case either in favour of the plaintiffs or in favour of the defendants; or whether I should decide that the matter to proceed to full trial.

[18] Upon reading the defendants' counsel's written submission and considering the terms of the preliminary order, the statement of agreed facts and the common agreed bundles of documents, with respect, I found it not legally feasible or appropriate for me to make any decision with regard to the multiple issues set out in the preliminary order. Accordingly, I dismissed the O 14A application and ordered that the matter be set for full trial as soon as possible.

[19] Now, I am mindful of the fact that my predecessor, Vincent Ng J, had made a preliminary order, and that the order has been perfected. Be that as it may, still, it is my view that if the circumstances are such that it is legally not feasible or appropriate for me to make my decisions on the multiple issues posed, then, I must rule that the matter ought to proceed to full trial as soon as possible.

[20] However, if the parties are serious in having the matter disposed off without having to go through the rigour of a normal trial, the procedure as provided for under O 33 rr 2, 3 and 5 of the RHC is still available to them (I will allude to O 33 rules 2, 3 and 5 again later in this judgment).

[21] Now, reverting to my dismissal of the O 14A application, my reasons for doing so are as follows.

[22] Firstly, the issues as set out in the preliminary order are too numerous and hence not suitable to be determined merely by way of an O 14A proceeding. There are two main issues and about 28 sub-issues (this number includes alternative or sub-sub-issues). The questions posed appear to be either question of law or on the construction of documents. This multiple number of issues is highly unusual for an O 14A application. Normally the court is called upon to determine just a few issues only.

[23] It is interesting to note, however, that, originally, before the parties even thought of the idea of invoking the O 14A procedure, there were only two agreed main issues to be tried before the court at the trial. They were as follows:

AGREED ISSUES BY THE PLAINTIFFS/DEFENDANTS
FOR TRIAL CONSIDERATION

(a) Whether the sale of 3,289,000 of the shares in Dayapi Industries

Berhad pursuant to the Memorandum of Deposit dated 27.12.1995 is valid, proper and/legally binding.

(b) Whether the plaintiffs suffered loss and were entitled to claim general and/or special damages.

Dated this 24th day of July, 2003

[sgn] [sgn]
Defendants' Solicitors Plaintiffs' Solicitors

[24] However, at the point of time when parties decided to invoke the O 14A procedure (instead of proceeding with the normal trial), the issues somehow seem to have multiplied many times over. This case would have been disposed of much earlier had parties not invoked the O 14A application and had parties not multiplied the issues.

[25] Secondly, I do not have before me the full facts of the case. Like I have said earlier, there is no affidavit evidence before me. It is, however, true that there is the statement of agreed facts. And it reads as follows:

STATEMENT OF AGREED FACTS

1.0 Ampang Granite — The Borrower

1.1 Ampang Granite Sdn Bhd, the above named 2nd Plaintiff ('Ampang Granite') applied for a Loan Facility of RM8,000,000.00 from Arab-Malaysian Finance Bhd, the above-named 1st Defendant ('Arab Finance') [refer to pages 355 to 361 and pages 374 to 377 of 3ABD].

1.2 This Loan Facility was evidenced at the onset by Letters of Offer dated 6.8.85 and 7.12.85. Following from the Loan Facility, Ampang Granite and Arab Finance entered into the following security agreements:

(a) Loan Agreement dated 27.12.85 [refer to pages 548 to 574 of 4ABD].

(b) A National Land Code Charge dated 2.7.86 over 24 units of various properties in Sri Serdang ("Sri Serdang Properties") [refer to pages 581 to 608 of 4ABD].

In addition, there was for the said Loan Facility, a Guarantee dated 27.12.85 delivered by Dato' Yap Peng [refer to pages 575 to 580 of 4ABD].

2.0 Security – Dayapi Holdings' said Dayapi Shares

2.1 In relation to the said Loan Facility, Dayapi Holdings (M) Sdn Bhd, the above named 1st Plaintiff ('Dayapi Holdings') provided security in terms of 3,400,000 shares in one Dayapi Industries (M) Bhd, now known as Golden Plus Holdings Berhad (in whole or part referred to as 'the said Dayapi Shares').

2.2 The security by way of the said Dayapi Shares is evidenced by a Memorandum of Deposit dated 27.12.85 executed by Dayapi Holdings in favour of Arab Finance. Pursuant to the said Memorandum, Arab Finance caused the Dayapi Shares to be registered in favour of Arab-Malaysian Nominees Sdn Bhd, the above named 2nd Defendant [refer to pages 609 to 623 of 4ABD].

3.0 Challenged Sale of the said Dayapi Shares

3.1 By a letter dated 16.1.90, Arab Finance informed Ampang Granite that 3,289,000 of the said Dayapi Shares had been contracted on 6.7.89 at a price of RM0.95 per said Share ('the Novus Sale') and that the proceeds of the Novus Sale were received on 12.1.90 for credit into the account of Ampang Granite with Arab Finance [refer to pages 495 and 496 of 3ABD.]

3.2 On 16.1.90, the said Dayapi Shares were being traded on the Kuala Lumpur Stock Exchange for the price of RM3.90 per said Share.

3.3 On 6.7.89, the said Dayapi Shares were being traded on the Kuala Lumpur Stock Exchange for the price of RM0.865 per said Share [refer to page 888 of 4ABD].

4.0 Related Proceedings & Events

4.1 Against the action herein which was commenced on 18.8.90, the following related proceedings exist:-

(a) on 21.10.91, Arab Finance commenced an action vide Kuala Lumpur High Court Civil Suit No. D2-22-1387-91 against Ampang Granite and Dato' Yap Peng for the amounts outstanding under the said Loan Facility less proceeds of the Novus Sale ("Suit No. 1387");

(b) on 10.9.93, the High Court granted summary judgment in Suit No. 1387 in favour of Arab Finance against Ampang Granite and Dato' Yap Peng ('the said Judgment') [refer to pages 80 and 81 of 2ABD]. On appeal to the Supreme Court vide Civil Appeal No. 02-605-93, the Supreme Court on 18.5.94 ordered, inter alia, that the enforcement of the said Judgment be stayed pending hearing and disposal of the action herein [refer to pages 1 to 6 of 1ABD];

(c) on or about 17.3.93, part of the charged Sri Serdang Properties were sold by public auction;

(d) on 15.9.95, the High Court in Shah Alam High Court Originating Summons No. 24-1041-93 granted an Order for Sale in respect of the remaining Sri Serdang Properties and permitted, inter alia, a redemption subject to the terms agreed between Arab Finance and Ampang Granite through their solicitors.

Dated this 25th day of June, 1998

[sgn]	[sgn]
Messrs Logan Sabapathy & Co	Messrs Shook Lin & Bok

[26] However, like I have said earlier, I find the statement of agreed facts insufficient to form a basis upon which to make the rulings on all the issues as required by the preliminary order.

[27] Thirdly, there are seven common agreed bundles of documents as mentioned in the preliminary order, but the preliminary order is not clear as to whether, besides their authenticity, the contents of the documents are agreed as well. In my view, if their contents are to be agreed as well, then either the agreed bundles themselves or the preliminary Order itself must say so in no uncertain terms. In *Jaafar Shaari & Anor (suing as administrator of the estate of Shofiah bt Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693; [1997] 4 CLJ 509, the Federal Court held (at p 706, MLJ) (at p 521, CLJ):

> First and foremost, the agreed bundle of documents means the documents therein are authentic and they do exist, therefore they require no proof of their authenticity by calling eg their makers.
>
> Secondly, the truth of contents of any of the documents in the agreed bundle of documents in the agreed bundle of documents is always not admitted unless the contrary is indicated directly or indirectly and such truth of such contents is liable to be challenged in court at the instance of either of the parties.

[28] This being the case, I am compelled to proceed on the footing that only the *authenticity* of the documents is agreed upon; but not their contents.

[29] In any event, even assuming that the contents of the documents are also agreed upon, still, the statement of agreed facts only alludes to just a few of the items of documents in the bundles. All in all there are, as stated in the order, seven common agreed bundles of documents containing a total of 160 items of documents. Yet, the statement of agreed facts alludes to only 10

items. The rest of the items of documents are not alluded to. The agreed documents in the bundles, even assuming that the contents are also agreed upon, yet, by themselves, do not constitute agreed facts or agreed evidence. They must be alluded to by the statement of agreed facts or by averments in evidence (but, as I have pointed out earlier, there is no affidavit evidence in the present O 14A proceedings) in such a manner that their contents becomes coherent facts (or form part of the facts) of the case.

[30] It is, however, true that, as I have observed, the preliminary order itself has referred to numerous documents in the bundles of documents. But with respect, I do not think that it is for the judge dealing with the O 14A application (that is myself) to examine each and every document mentioned in the preliminary order, but without the benefit of any oral or affidavit evidence that explains the relevance of the document in question; and then to piece up the contents of the documents together, like solving a jigsaw puzzle, so as to ascertain the facts of the case, and then endeavour to make a determination on the issues posed. With respect, I have not come across such a procedure as this before. To my mind, such documents are meaningless, notwithstanding the fact that they are from 'agreed' bundles and are referred to by the preliminary order. A document, even if it comes from an agreed bundle, becomes meaningful to the trial judge only if it is introduced or accompanied by statement (by way of oral testimony of witnesses or by way of affidavit evidence) explaining, among other things, the circumstances under which the document is made or written, the purpose of the document, the content of the document, and what the maker of the document intends the document to mean.

[31] Fourthly, the plaintiffs' counsel was absent on the day of the hearing of the O 14A application. The plaintiffs were the co-applicants in this O 14A proceeding, yet their counsel were absent without good reason. Hence, there was no written submission submitted by the plaintiffs. Without the benefit of having the plaintiffs' written submission before the court, the court was deprived of an important piece of material to work on for the purpose of arriving at a decision that is fair and just to both parties.

[32] Finally, with respect, it is my view that an O 14A application may only be invoked at an early stage of the proceeding. The procedure cannot be invoked at a very late stage of the proceeding. In the present case, the O 14A application was made by the parties at a very late stage of the proceeding: very late in both senses, that is to say, in terms of time as well in terms of the progress of the proceeding. In terms of time, the writ was filed in 1990, yet the O 14A application was only made 16 years later in the year 2006! In terms of the progress of the proceeding, at the time when the O 14A

application was made, the case management procedure had more or less been completed and the case had in fact been set down for trial.

[33] It is true that r 1(1) contains the words '… at any stage of the proceedings …' However, in my judgment, this phrase '… at any stage of the proceedings …' cannot be given too literal an interpretation. Nor can it be read in isolation. Where the proceeding has already reached the trial stage, O 14A must read in conjunction with O 33, in particular, rr 2, 3 and 5. In the present case, however, I do not propose to make a ruling as to exactly at which stage of the proceeding that a party ceases to be entitled to invoke the O 14A procedure. But it is a very pertinent fact to note that as at 7 March 2006, when parties first applied to the court to invoke the O 14A procedure, the proceeding was already at a very advanced stage. Indeed, as a matter of fact, long before that date and way back in 1998 (that is as far back as eight years before the application was made!) the case had already gone to trial and in fact it was part-heard by Selventhiranathan J on 24 and 25 June 1998. But in those days when the matter was before Selventhiranathan J the case management procedure had not yet been introduced into our Rules of the High Court of 1980. After O 34 of the RHC was amended in 2000 so as to introduce the case management procedure, the plaintiff filed Form 63 (as required by the new O 34 r 2) on 12 October 2001 (see encl 74). Thereafter, the case management of the case was carried out by the Vincent Ng J (who was directed by the Chief Judge (Malaya) vide letter dated 24 October 2002 (encl 82) to take over conduct of the case from Selventhiranathan J, and parties had agreed to have the matter heard de novo), and by 24 May 2004 the case management had been completed. By this date, the common agreed bundles of documents, the statement of agreed facts and the statement of agreed main issues had already been finalized, filed and served and the case had been set down for trial. Originally, it was fixed for trial to be held on the following dates: 15–18 March 2004; but it was later postponed to 24–27 May 2004 after parties had informed the court that the case management process has yet to be completed and that there was a possibility of an amicable settlement. However, subsequently, parties were unable to settle amicably and after several postponements the case was eventually fixed for trial to be held on 6–9 March 2006. Now, this being the position, I would rule without hesitation that the right to invoke an O 14A application had certainly ceased once the case has reached the final stage of case management (meaning the common agreed bundles of documents, the statement of agreed facts and the statement of agreed main issues have been filed and served) and the case had been set down for trial. In other words, by 24 May 2004 there can be no doubt that as a matter of procedural law the parties could no longer invoked O 14A. In my judgment, when the proceeding has reached such an advanced stage of the proceeding or had practically reached the trial stage, as has happened in the present case, the appropriate course to adopt, should any party be of view that the cause could be disposed of without the need of a

normal trial, is not to invoke O 14A, but to invoke O 33 r 2, r 3(2) and r 5 of the RHC. These provisions of O 33 state:

> Rule 2 Time, etc, of trial of questions or issues (O 33 r 2)
>
> The Court may order any question or issue arising in any cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.
>
> ...
>
> Rule 3 Determining the mode of trial (O 33 r 3)
>
> (3) In any such action different questions or issues may be ordered to be tried by different modes of trial and one or more questions or issues may be ordered to be tried before the others.
>
> ...
>
> Rule 5 Dismissal of action, etc after decision of preliminary issue (O 33 r 5)
>
> If it appears to the Courts that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.

[34] Application is dismissed but with no order as to costs; case to proceed to full trial as soon as possible.

Application dismissed with no order as to costs.

Reported by Agustine Soosay